

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LORNE ADAMS,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. S19C-12-028 MHC
)	
COMMUNITY BANK)	
DELAWARE,)	
)	
Defendant.)	

MEMORANDUM OPINION

Submitted: November 4, 2021

Decided: January 27, 2022

Upon Consideration of Defendant's Motion for Partial Summary Judgment,
GRANTED IN PART and DENIED IN PART.

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Attorney for Plaintiff Lorne Adams.

Kevin J. Connors, Esquire, Aaron E. Moore, Esquire, Marshall, Dennehey,
Warner, Coleman & Goggin, P.C., Wilmington, Delaware, *Attorneys for Defendant*
Community Bank Delaware.

CONNER, J.

INTRODUCTION

Plaintiff Lorne Adams (“Plaintiff”) allegedly sustained an injury while working for Defendant Community Bank Delaware (“Defendant”). Following the workplace injury, Plaintiff filed a claim with Defendant’s workers’ compensation carrier. Soon thereafter, Plaintiff was terminated from his employment. Plaintiff alleges that Defendant violated 19 *Del. C.* § 2365 by terminating him in retaliation for claiming workers’ compensation benefits. Defendant, through a motion for partial summary judgment, seeks to preclude the potential award of compensatory damages to Plaintiff. For the following reasons, Defendant’s Motion for Partial Summary Judgment is **GRANTED IN PART and DENIED IN PART**.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual History

Defendant is a financial institution insured by the Federal Deposit Insurance Corporation (“FDIC”).¹ Plaintiff was hired by Defendant in November 2016 for an Information Technology Manager position at a salary of \$70,000.² Plaintiff received multiple pay raises and at least one favorable performance evaluation

¹ See Def.’s Mot. Summ. J. ¶ 11.

² See Compl. ¶ 5; *see also* Pires Aff. ¶ 2.

while working for Defendant.³ Plaintiff's final pay increase to a salary of \$120,000 occurred in April 2019.⁴

On August 20, 2018, Plaintiff became aware that he was the target of an Internal Revenue Service investigation (the "investigation").⁵ Plaintiff told Defendant about the investigation that same day.⁶ Representatives of Defendant recommended attorneys to Plaintiff in relation to the investigation.⁷ At this time, it is unclear exactly how much Plaintiff knew about the investigation and how much he told Defendant about the investigation.

On April 11, 2019, Plaintiff allegedly sustained a workplace injury that temporarily prevented him from working.⁸ Plaintiff returned to restricted work on April 22, 2019.⁹ At some point prior to May 3, 2019, Plaintiff hired counsel and filed a claim with Defendant's workers' compensation carrier, Cincinnati Insurance.¹⁰

Between April 17, 2019, and May 2, 2019, representatives of Defendant communicated with the Cincinnati Insurance claim adjuster regarding Plaintiff's

³ Compl. ¶¶ 6–7.

⁴ *Id.* at ¶ 7. The timing of Defendant's decision to award the April 2019 pay raise is not yet entirely clear.

⁵ Pl's Resp. to Def.'s Interrogs. at No. 19.

⁶ *Id.* at No. 21.

⁷ *Id.*

⁸ Compl. ¶¶ 8, 11.

⁹ *Id.* at ¶ 13.

¹⁰ *See Id.* at ¶ 21; *see also* Pl's Resp. to Def.'s Interrogs. at No. 4.

workplace injury.¹¹ On May 3, 2019, a meeting with Plaintiff, Alex Pires (“Pires”), Jack Riddle and Shannon McGinn was held.¹² Although the meeting was allegedly recorded, a copy of the recording was not provided to the Court.

Following the meeting, Pires suspended Plaintiff with pay.¹³ Plaintiff was given a brief letter stating that he was suspended.¹⁴ That letter lacked any explanation for the suspension.¹⁵ On May 24, 2019, Pires advised Plaintiff via email that he was terminated.¹⁶ The email did not provide any reason for the employment decision.¹⁷

As previously stated, Plaintiff returned to restricted work on April 22, 2019, until his suspension.¹⁸ Plaintiff settled his workers’ compensation case receiving temporary total disability benefits from April 12, 2019, through April 21, 2019, and beginning again from May 24, 2019, ongoing.¹⁹ As of January 6, 2021, he receives temporary partial disability benefits.²⁰

On January 24, 2020, Plaintiff plead guilty in the United States District Court for the District of Delaware to Making False Statements on a Tax Return, in

¹¹ Def.’s Resp. to Pl.’s Interrogs. at No. 14.

¹² Pl.’s Resp. to Def.’s Interrogs. at No. 6; Compl. ¶ 19.

¹³ Compl. ¶ 29.

¹⁴ Compl. Ex. A.

¹⁵ *See id.*

¹⁶ Compl. Ex. B.

¹⁷ *See id.*

¹⁸ Compl. ¶¶ 13, 15.

¹⁹ Pl.’s Br. at 2–3; Pl.’s Br. Ex. C.

²⁰ *Id.*; Compl. ¶ 33.

violation of 26 U.S.C. § 7206(1).²¹ The plea agreement included a waiver of certain appellate rights.²² However, Plaintiff reserved the right to file an appeal on the grounds of ineffective assistance of counsel and on specific sentence-related grounds.²³ On August 17, 2020, the Honorable Richard G. Andrews sentenced Plaintiff to probation for a term of 18 months, ordered Plaintiff pay restitution in the amount of \$112,628.00 and a fine of \$10,000.²⁴

B. Procedural History

On December 20, 2019, Plaintiff filed a Complaint alleging that Defendant violated 19 *Del. C.* § 2365 by terminating him after he claimed workers' compensation benefits. On June 3, 2021, Defendant filed a motion for partial summary judgment on the issue of damages. Plaintiff filed a response on August 13, 2021. Oral argument was held on October 5, 2021. Supplemental briefs regarding relevant FDIC banking regulations and clarification on the timeline of the workers' compensation claim were filed by both parties on November 4, 2021.

²¹ Def.'s Mot. Summ. J. Ex. B.

²² *Id.* at 5.

²³ *Id.*

²⁴ Def.'s Mot. Summ. J. Ex. C.

PARTY CONTENTIONS

Defendant seeks to preclude the availability of compensatory damages. Its argument hinges on a particular clause in Section 2365 that reads, “if the employee shall cease to be qualified to perform the duties of employment, the employee shall not be entitled to such restoration and compensation.”²⁵ Defendant contends that there are two reasons why Plaintiff is no longer qualified to perform the duties of employment, and thus ineligible for any compensatory damages: i) Plaintiff’s disability prevented him from being qualified to perform the duties of employment from May 24, 2019, to January 24, 2020, and ii) Plaintiff’s federal guilty plea prevented him from being qualified to remain employed by Defendant after January 24, 2020.

Defendant cites two authorities supporting the argument that the federal guilty plea resulted in Plaintiff’s disqualification for employment: i) continued employment after the conviction would violate the Defendant’s employee handbook, and ii) allowing Plaintiff to continue working for Defendant after the conviction would expose Defendant to substantial penalties under 12 U.S.C. 1829.

Plaintiff argues that Defendant’s Motion should be denied because genuine issues of material fact exist. Plaintiff takes issue with Defendant’s contention that

²⁵ 19 *Del. C.* § 2365.

Plaintiff's disability prevented him from being qualified to perform the duties of employment because Plaintiff was able to work at the time of his termination.

Additionally, Plaintiff claims that his favorable performance evaluations at work and his unique position in the company raise a factual question sufficient to survive summary judgment as to whether his employment would have continued beyond his conviction in the United States District Court for the District of Delaware. Further, Plaintiff claims that measures can be taken to make him qualified to remain employed. The hopeful measures Plaintiff cites include a court order requiring Defendant to sponsor an FDIC application for exemption from the penalties under 12 U.S.C. 1829 and a possible expungement of his conviction.

STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 56, entry of summary judgment is appropriate if “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.”²⁶ The movant must first establish that no material issues of fact are present.²⁷ If the moving party satisfies this requirement, “the burden then shifts to the non-moving party to demonstrate that there are material issues of fact.”²⁸

²⁶ Super. Ct. Civ. R. 56(c).

²⁷ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

²⁸ *Id.* at 681.

This Court must examine the record in the light most favorable to the non-moving party to determine whether a material issue of fact exists.²⁹ Where a reasonable person would draw only one conclusion from the facts, the issue becomes a decision as a matter of law.³⁰ However, summary judgment is not appropriate if “it seems desirable to inquire thoroughly into [the facts] in order to clarify the application of the law to the circumstances.”³¹

DISCUSSION

A. Applicable Statutes

Under 19 *Del. C.* § 2365, employers are prohibited from retaliating against employees who claim workers’ compensation benefits.³² Section 2365 provides in relevant part:³³

It shall be unlawful for any employer or the duly authorized agent of any employer to discharge or to retaliate or discriminate in any manner against an employee as to the employee's employment because such employee has claimed or attempted to claim workers' compensation benefits from such employer If the Court, after hearing, finds in favor of the employee, the employee shall be restored to employment or to the position, privilege, right or other condition of employment denied by such action and shall be compensated for any loss of compensation and damages caused thereby, as well as for all costs and attorney's fees, as fixed by the Court, except that if the employee shall cease to be qualified to perform the duties of employment, the employee shall not be entitled to such

²⁹ *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

³⁰ *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967); *State v. Laurel Delaware Congregation of Jehovah's Witnesses*, 2016 WL 369355, at *2 (Del. Super. Jan. 26, 2016).

³¹ *Ebersole v. Lowengrub*, 180 A.2d 467, 469–70 (Del. 1962).

³² *See Norwood v. Mid Sussex Rescue Squad, Inc.*, 2016 WL 2621298, at *1 (Del. Super. Apr. 20, 2016).

³³ 19 *Del. C.* § 2365.

restoration and compensation. An employer who violates this section shall be liable to pay a penalty of not less than \$500 and not more than \$3,000, as may be determined by the Court

A plain reading of this statute makes clear that compensatory damages may be limited when an employee is no longer employable.

As an FDIC-insured institution, Defendant is subject to federal banking regulations.³⁴ Under 12 U.S.C. § 1829, banks such as Defendant are prohibited from employing certain individuals.³⁵ Section 1829 reads in pertinent part:³⁶

Except with the prior written consent of the [FDIC] any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering . . . may not become, or continue as, an institution-affiliated party with respect to any insured depository institution. . . .Whoever knowingly violates subsection (a) shall be fined not more than \$1,000,000 for each day such prohibition is violated or imprisoned for not more than 5 years, or both.

When Plaintiff's conviction was finalized, the restrictions and potential penalties listed in 12 U.S.C. § 1829 took effect. Supervisory guidance published by the FDIC expressly states that § 1829 applies to tax evasion crimes.³⁷ Moreover, it is undisputed that § 1829 applies in this case. However, FDIC regulations provide that an individual may receive the FDIC's consent for an exemption from § 1829 through a bank-sponsored application or an individual application.³⁸ Additionally,

³⁴ See generally 12 U.S.C. § 1828.

³⁵ See *Drubetskoy v. Wells Fargo Bank, N.A.*, 2013 WL 6839508, at *3 (D. Md. Dec. 20, 2013).

³⁶ 12 U.S.C. § 1829(a)(1)(A)(i), (b).

³⁷ Def.'s Br. Ex. 1 at 1.

³⁸ *Id.* at 5; see also 12 C.F.R. § 303.228.

“certain minor or *de minimis* convictions . . . are deemed automatically approved and would not require an application.”³⁹

Here, there was no bank-sponsored application. Also, there is no evidence that Plaintiff filed an individual waiver application and Plaintiff’s conviction under 26 U.S.C. § 7206(1) does not qualify as a *de minimis* conviction.⁴⁰ Therefore, pursuant to U.S.C. § 1829, if Plaintiff was to resume working for Defendant, Defendant and its employees could be fined up to \$1,000,000 and imprisoned for up to five years for each day Plaintiff was employed.⁴¹ For example, had Defendant violated the forementioned federal banking regulations by employing Plaintiff for merely one week after § 1829 applied, Defendant could face \$7,000,000 in fines and employees of Defendant could face 35 years in prison. The only reasonable conclusion that can be drawn from these facts is Plaintiff was no longer qualified to perform the duties of his employment with Defendant. Due to an inability to perform the duties of employment, compensatory damages under 19 *Del. C.* § 2365 must be limited.

³⁹ Def.’s Br. Ex. 1 at 3.

⁴⁰ See 12 C.F.R. § 303.227.

⁴¹ See 12 U.S.C. § 1829(b).

B. Finality of the Federal Conviction

An examination of the record in the light most favorable to Plaintiff results in the conclusion that he was no longer qualified to perform the duties of employment as of August 31, 2020. Third Circuit Courts have held that convictions become final when the time period for direct appeal expires.⁴² Pursuant to the Federal Rules of Appellate Procedure, “a [criminal] defendant's notice of appeal must be filed in the district court within 14 days after the later of the entry of either the judgment or the order being appealed; or the filing of the government's notice of appeal.”⁴³

Here, the United States District Court for the District of Delaware entered the judgment of conviction against Plaintiff on August 17, 2020. While Plaintiff waived multiple appellate rights, he retained the right to appeal on certain grounds. It appears that the 14-day time period for appeal expired uneventfully on August 31, 2020. Under the Federal Rules of Appellate Procedure and Third Circuit precedent, the judgment of conviction became final on August 31, 2020. At the time the conviction became final, 12 U.S.C. § 1829 controlled the ability of Defendant, an FDIC-insured institution, to retain Plaintiff, which means that

⁴² *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir.1999); *DeJesus v. United States*, 2008 WL 2945959, at *3 (D.N.J. July 30, 2008).

⁴³ Fed. R. App. P. 4(b)(1)(A)(i)–(ii); *see also United States v. Shehadeh*, 962 F.3d 1096, 1098–99 (9th Cir. 2020).

Plaintiff ceased to be qualified to perform the duties of employment, and in turn ineligible for compensatory damages under 19 *Del. C.* § 2365 as of August 31, 2020.

C. Plaintiff's Injury

There is a genuine issue of material fact regarding whether Plaintiff's injury prevented him from being qualified to perform the duties of employment. The fact that Plaintiff returned to restricted work following his injury and was working, albeit in a restricted manner, at the time of his termination seems to indicate that his physical condition did not prevent him from being qualified to work in May 2019. However, Plaintiff received total disability benefits as of the day of termination and he stated in an interrogatory response that he was totally disabled.⁴⁴ The exact nature and the magnitude of Plaintiff's injury, his treatment and prognosis is not obvious. A reasonable jury could draw multiple conclusions from these facts. This muddled picture requires denial of summary judgment on this issue to allow for a thorough inquiry into the facts in order to clarify the application of the law to the circumstances. Specifically, it is necessary to allow the record to develop in regard to the extent Plaintiff would have been physically able to work for Defendant between the termination of his employment and the finalization of his federal conviction.

⁴⁴ See Pl's Resp. to Def.'s Interrogs. at No. 25.

CONCLUSION

Partial summary judgment is **GRANTED** on the issue of whether compensatory damages under 19 *Del. C.* § 2365 are limited by the finalization of Plaintiff's conviction under 26 U.S.C. § 7206(1). Accordingly, compensatory damages are restricted to the time period prior to August 31, 2020. Summary judgment is **DENIED** on the issue of whether compensatory damages are limited by Plaintiff's injury and disability after his termination on May 24, 2019.

Accordingly, Defendant's Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART.**

IT IS SO ORDERED.

/s/ Mark H. Conner

Mark H. Conner, Judge

cc: Prothonotary